As the cars began to move and the couplings loosened, Andre reached in, pulled the pin and placed both hands on the grab-iron next to the running board and with his feet in the stirrup, was reaching from the bottom grab iron for the top grab iron, when he fell to the ground because of the stopping of the slowly moving (3 or 4 miles per hour) switching train and was severely injured. Mr. R. L. Black, the engineer, called as a witness on cross-examination by counsel for Andre, testified as follows:

"Q. Did Mr. Tilton (engine foreman) give you a flag down signal to stop the train?

"A. No Sir:

"Q. Why then, Mr. Black, did you stop the train?

"A. Because of the fact that fumes from the acid fumes and chemicals up around those plants at times would cause your eyes to be burning and watering and then cause you to sneeze and I had to sneeze and my eyes were burning too. So I shut off—put the brakes on to stop because I knew I would not be able to see—at the time I wouldn't be able to see the engine foreman if he did flag me down and I didn't want to take a chance on running into a string of cars."

When asked by the same counsel if he usually stopped his train when about to sneeze, Engineer Black disposed of the question by answering that he did not often sneeze but that under Safety Rule No. 108 of the Illinois Central Railroad Company, he had the right to stop his engine without a signal whenever there might be a case of doubt.

This suit was brought under the provisions of the Federal Employers Liability Act and allegations that the injuries suffered by Andre were caused by the "sole negligence and carelessness of the fellow employees and members of the crew with whom Andre was working, in the following respects:

"1. They failed to give him any warning or signal whatsoever that the train was brought to a sudden or jerking halt.

"2. They caused the train to make a sudden or jerking halt.

"3. In failing to observe his position before bringing the train to a sudden or jerking halt without giving him any signal or warning that same would be done."

Complainant supported these charges of negligence and carelessness of his fellow-employees by the testimony of Engineer Black that he did stop the switching operations of the slowly moving train without warning or signal and which he explained, was caused by and due to the attack of sneezing he suffered resulting from the fumes and chemicals in the switching area.

Defendant Railroad denied that the acts of Engineer Black in the situation and under the circumstances were acts of negligence, either in law or in fact, and charged that Andre was injured solely because of his own negligence and through no fault or negligence of his fellow employees, the members of the switching crew with whom he was working.

The jury awarded Andre Ninety One Thousand ($91,000.00) Dollars on November 20, 1957, and on November 29,

1957, Railroad filed its motion to set aside the verdict and for a new trial and, in the alternative, for a remittitur of an amount commensurate with the evidence of the injuries suffered by Andre, and, again, on February 11, 1958, filed a further motion for a remittitur. On May 9, 1958, the District Trial Judge granted Railroad a new trial unless Plaintiff agreed to enter a remittitur of Twenty-one Thousand ($21,000) Dollars, upon which, on June, 1958, Plaintiff filed his remittitur in that amount, thus avoiding a new trial and judgment was then entered for Seventy Thousand ($70,000) Dollars.

Railroad took and perfected its appeal to the Fifth Circuit Court of Appeals, filing its supersedeas bond and, on May 13, 1959, that Court affirmed the judgment in an opinion forming a part of the record transmitted herewith and upon which this writ of certiorari of Railroad is based.

REASONS FOR GRANTING THE WRIT

Your Honors should grant writs of certiorari and judicially recognize and correct the error of the Fifth Circuit Court of Appeals which failed, in accordance with the mandate of this Court as set forth in *Erie Railroad Company v. Tompkins*, to follow and conform with the established definitive jurisprudence of the Appellate Courts of Louisiana as exemplified in the decisions in *Snodgrass v. Centannic*, 229 Louisiana 915, 87 Southern 2nd 127, and the citations therein contained, as hereinafter set forth.

The writs herein applied for should be granted as there is a serious conflict in the jurisprudence established by the Fifth Circuit Court of Appeals and exemplified in this present case and that established by the Court of Appeals for the District

of Columbia and exemplified in *Moore v. Capital Transit Company*, 226 Fed. 2nd 57, and *Cohen v. Petty*, 65 Fed. 2nd 820, and the citations therein contained, as hereinafter set forth.

Your Honors should grant writs of certiorari and judicially recognize and correct the error of the Fifth Circuit Court of Appeals in this case in failing to find and hold that the Railroad was not guilty of an act of negligence when the sole evidence in the record shows that the stopping of the switching operations was caused by and the result of an attack of sneezing suffered by the engineer and brought on by conditions and circumstances outside of and beyond the control of the Company or the engineer.

The Appellate Court is in error in saying and holding that: "The fact that a sneeze is involuntary, violent and sudden, **is not decisive of the question.**"

* * *

Sneezing, or sternation—as it is medically known—is defined in *Dorland's Medical Dictionary* as an act of forcibly and spasmodically expelling air through the nose and mouth and usually results from irritation of the nasal mucara by dust, gases and other substances. It is an allergic reaction, according to Lowenberg in his "Medical Diagnosis" (p.94) and is **"involuntary, sudden, violent** and **audible."**

Yater, in his "Symptom Diagnosis" text asserts that, among other causes, it may be produced by a great variety of substances inhaled into the nose, such as dust, smoke, gas fumes, etc. and does produce a **temporary involuntary muscular action or reaction**, which varies in degree according to the severity of the sneeze.

Encyclopaedia Brittanica, (1957 Edition), page 853, defines:

> "Sneezing, a **violent** expiration of air from the nose and mouth; it is an **involuntary reflex respiratory act**, caused by irritations of the nerve endings of the mucous membrane of the nose or by stimulations of the optic nerve by a bright light." (Emphasis ours)

The New Century Dictionary, Volume 2, page 1753, defines a sneeze as:

> "To emit air or breath **suddenly, forcibly** and **audibly** through the nose and mouth by **involuntary spasmodic action.**" (Emphasis ours)

Webster's *New Dictionary*, Page 703 Concise Ed. 1956, says:

> "Sneeze. To make a **sudden, violent, spasmodic** and **audible expiration of breath.**" (Emphasis ours)

There can be no dispute in fact or in law, by common knowledge or by medical and dictionary definitions, that an attack of sneezing is involuntary, sudden and violent and any individual or judge by his own personal experience and of his own knowledge knows that a sneeze accompanied by burning and watering of the eyes renders one temporarily and involuntarily and suddenly unable to see or have proper control of muscular power and results in immediate suspension of any action or activity that requires the normal use of the senses.

And, if one, like Engineer Black, is charged with the control of a locomotive engine, switching a cut of tank cars, and is suddenly and unexpectedly afflicted by acid fumes and

chemicals from plants in the area of his operations, resulting in causing his eyes to burn and water and causing him to sneeze, a situation brought on by outside circumstances, beyond and outside his control or that of his employer, and at such a time and in such a situation, reacts as a normal, reasonable prudent and experienced engineer, using his best judgment and stops his switching operation to avoid what he thought would present a serious switching mishap, has neither in law nor in fact committed an actionable act of negligence.

The spreading of the acid fumes from the switching area plants was beyond the control of Railroad or any of its employees. It was by an act of God or of nature or of both and:

> ". . . it was a manifestation of the forces of nature which man cannot resist. The fact that no human agency can resist an Act of God renders misfortune occasioned solely thereby a loss by inevitable accident which must be borne upon whom it falls." (38 American Jurisprudence, 649)

Faced by the emergency of burning and watering eyes and having to sneeze, a situation that all the definitions call involuntary, violent and sudden, Engineer Black made a sudden stop of his slowly moving switching operations and:

> "The prudence and propriety of an action are not to be judged by the event, but by the circumstances under which it was done. The rule is, as stated generally, that one who, in a sudden emergency, acts according to his best judgment, or who, because of the want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence provided he exercised' in the emergency the care of a reasonably prudent individual under like circumstances. The fact that injurious consequences might have been avoided had

he selected another course, does not charge him with negligence." (38 American Jurisprudence, 686.)

The general rule, is stated by *Corpus Juris Secundum* (Vol. 65, p. 408, et seq.) to be:

> "One confronted with a sudden emergency is not held to the same accuracy of judgment as would be required of him if he had time for deliberation; and, if he exercises such care as an ordinarily prudent man would exercise when confronted by a like emergency, he is not liable for an injury which has resulted from his conduct, even though another course of conduct would have been safer, or even might have avoided the injury, as **under such circumstances, the injury is regarded as the result of an inevitable accident.**"

The Supreme Court of Louisiana (*Snodgrass v. Centannie*, 87 So. 2d 127, March 26, 1956) quotes both of the two above from both *American Jurisprudence* and *Corpus Juris Secundum*, and says:

> "The rule is well stated in Corpus Juris Secundum that when a person exercises care and caution in an emergency which an ordinarily prudent man would have used under the same or similar circumstances, he is not negligent merely because he fails to exercise the best judgment or does not take the safest course or does not take every precaution which, from a careful review of circumstances, it appears he might have taken. * * * The law does not require such a choice as, under all known or obvious circumstances, a reasonably prudent man might make. A person is by no means held to the same judgment and activity under all the circumstances. The opportunity to think and act must be taken into consideration in determining whether due care was exercised in making a

> choice between methods or courses of conduct. The fact that one acts in the stress of an emergency or sudden peril not due to his own act or omission justifies conduct that would otherwise be regarded as negligent."

These sound principles of law have been applied to cases involving street cars, airplanes and automobiles and they fit and apply as well in emergency and unexpected situations arising in a railroad switching operation.

In *Chapman, et ux v. United States*, 194 Fed. Rep. 2d 974, the Court of Appeals for the Fifth Circuit had before it a suit for the recovery of damages arising out of the death of a passenger in a crash of an airplane of the United States Air Force in which the pilot and all others in the plane were killed. The basis of the suit was the negligence of the pilot. Among the specifications on the appeal was that the lower court erred in excluding from evidence the Army Air Force Board's report of the accident investigation which set forth the Board's opinion that the pilot just before the crash occurred exercised poor judgment and technique.

Chief Judge Hutcheson was the organ of the Court, with no dissent, in sustaining the trial court, saying:

> "Since we cannot know the facts, and conjecture may not serve as proof of them the *post hoc* armchair speculations of the report, if admitted in evidence, may not serve as such. Nor may we, on the basis of these forbidden substitutes for evidence, conclude that the district judge made a clear error in finding no negligence and that his judgment refusing to convict the dead pilot of wrong doing without evidence and to require the United States to stand in damages was wrong and must be reversed. Indeed, we think the evidence standing as it does, that a

finding that the pilot was negligent, and the United States was liable, would do great violence to the evidence and to the law governing those who, finding themselves in the emergency of swift and dire peril, brought about by no fault of their own, adjust themselves to it as best they can and fight a brave and unremitting fight to the bitter end.

"It would be difficult, we think, to find a case more demanding of the application of these controlling legal principles than this one presents. As stated and supported by full authority in 38 Am. Jur., **'Negligence,'** Sec. 41 **'Acts in Emergency or Sudden Peril,'** at page 686: 'The propriety and prudence of an action are not to be judged by the event but by the circumstances under which it was done. The rule, as stated generally, is that one who, in a sudden emergency, acts according to his best judgment, or who, because of want of time, in which to form a judgment omits to act in the most judicious manner, is not chargeable with negligence. * * * The fact that injurious consequences might have been avoided had he chosen another course of conduct does not charge him with negligence.'

"Or, as the rule is stated on page 687: '* * * the sound view appears to be that one who through no fault of his own, is confronted with a sudden peril and does things which afterward may seem to have been improper or foolish is not negligent if he does what a prudent man would or might do under the circumstances."

In *Moore v. Capital Transit Company* (226 Fed. 2d 57, Sept. 8, 1955), the United States Court of Appeals for the District of Columbia Circuit held:

"There is no need for us to remand the case for a new trial if the judgment n.o.v. was properly entered. We hold that it was under the authority of Cohen v. Petty, 62 App. D.C. 187, at page 188, 65 F. 2d, 820, at page 821, where Judge Groner said:

"'It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. Armstrong v. Cook, 250 Mich. 180, 229 N.W. 433; Slattery v. Haley, Dom. Law Review, 1923 (3), p. 156.'"

In *Cohen v. Petty* (65 Fed. Rep. 2d 820), quoted from the above opinion that Court further said:

"In the present case the positive evidence is all to the effect that defendant did not know and had no reason to think he would be subject to an attack such as overcame him. Hence, negligence cannot be predicated in this case upon defendant's recklessness in driving an automobile when he knew or should have known of the possibility of an accident from such an event as occurred. * * * Even if plaintiff's own evidence tended more strongly than it does to imply some act of negligence, it would be insufficient to sustain a verdict and judgment upon proof such as defendant offered here, of undisputed facts, for in such a case the inference must yield to uncontradicted evidence of actual facts."

The record here shows nothing to disprove the statement of Engineer Black that he suffered from an unexpected watering and burning of his eyes from acid fumes and chemicals in the area that caused him to sneeze and his answers to questions from counsel of plaintiff shows that he had no reason to think he would be subject to such an attack as overcame him:

"Q. Mr. Black, do you usually stop the train when you are about to sneeze?

"A. I don't often sneeze."

We come squarely under the rules as they have been defined by our Federal and State courts and, as a matter of law, the Court of Appeals for the Fifth Circuit was in error in not recognizing and holding that the actions of the engineer who suffered from an attack of sneezing brought on by outside circumstances beyond his control or that of Railroad employer was not such as to make Railroad guilty of negligence and liable to switchman Andre.

The fact that Engineer Black did so sneeze and that a sneeze is involuntary, violent and sudden is legally decisive of the question and is the basis of this application for a writ of certiorari which should be granted so that this court can review and then reverse the judgment of the Court of Appeals.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted and that the judgment of the Court of Appeals, Fifth Circuit, should be reversed.

Respectfully submitted,

H. PAYNE BREAZEALE
620 Commerce Building
Baton Rouge, Louisiana
Attorney for Petitioner

JOSEPH H. WRIGHT,
JOHN W. FREELS,
LEMLE & KELLEHER,
BREAZEALE, SACHSE, WILSON & HEBERT,
Of Counsel.